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No. 548

Supreme Court of the United States.

OCTOBER TERM, 1962.

STOWE-WOODWARD, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

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Supreme Court of the United States.

OCTOBER TERM, 1962.

STOWE-WOODWARD, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Stowe-Woodward, Inc., petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in the above action on June 28, 1962.

Opinions Below.

The opinion and judgment of the United States District Court for the District of Massachusetts, reported in 200 F. Supp. 855, is reprinted as Appendix A.

The opinion of the Court of Appeals and its opinion denying rehearing, reported in F. 2d , are reprinted as Appendices B and C.

Jurisdiction.

The judgment of the Court of Appeals was entered on June 28, 1962. The petition for rehearing was denied on July 25, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

Question Presented.

Whether the decisive event for determining the statutory (26 U.S.C. § 4216(a)) exclusion of transportation and other charges (from the price of an article subject to the manufacturer's excise tax) is shipment from the factory or place of production.

Statutes Involved.

Internal Revenue Code of 1954:

"SEC. 4161. IMPOSITION OF TAX.

"There is hereby imposed upon the sale by the manufacturer, producer, or importer of the following articles (including in each case parts or accessories of such articles sold on or in connection therewith, or with the sale thereof) a tax equivalent to 10 percent of the price for which so sold:

. . . . . .

"Bowling balls and pins.

. . . . . ."

26 U.S.C. (1958 ed.) § 4161:

"§ 4216. DEFINITION OF PRICE.

"(a) Containers, packing and transportation charges.

"In determining, for the purposes of this chapter, the price for which an article is sold, there shall be included

any charge for coverings and containers of whatever nature, and any charge incident to placing the article in condition packed ready for shipment, but there shall be excluded the amount of tax imposed by this chapter, whether or not stated as a separate charge. A transportation, delivery, insurance, installation, or other charge (not required by the foregoing sentence to be included) shall be excluded from the price only if the amount thereof is established to the satisfaction of the Secretary or his delegate in accordance with the regulations."

Statement.

Petitioner brought suit in the United States District Court for the District of Massachusetts to recover certain amounts of Federal manufacturer's excise tax, plus interest, paid by it for the calendar years 1957 and 1958 (R. 1, 3-11).[1] The jurisdiction of that Court was based on 28 U.S.C. § 1346(a)(1). The following facts, which were developed by stipulation (R. 15, 19) and by exhibits (R. 6-11, 18), were before that Court:

Petitioner (hereinafter "taxpayer") is a corporation organized under the laws of the Commonwealth of Massachusetts, with its principal place of business located in Newton Upper Falls, Massachusetts, where it manufactures hard-rubber bowling balls. Its sales territory for bowling balls encompasses practically the entire United States.

The balls are packed four to a carton, and generally no sale of less than a carton is made. All shipments from its plant in Newton Upper Falls directly to customers either are sent freight collect, or the freight is billed separately

[1] The "R" references are to the separately bound Record Appendix to the Appellant's Brief in the Court of Appeals.

to the customer. All balls shipped from its plant directly to customers are sold at a uniform base price F.O.B. plant (R. 19-20).

Shipment of the bowling balls over land to the West Coast used to cost about $1.50 per ball. In order to meet competition on the West Coast, bowling balls were sent to public warehouses on the West Coast (Los Angeles and Oakland, California, and Tacoma, Washington) in carload or shipload lots. As a result, the transportation charges were reduced from about $1.50 per ball to approximately $.75 or $.80 per ball for shipping and warehouse costs. The warehouses stocked the bowling balls and delivered them to the purchasers on notification from the taxpayer. The purchaser made his own arrangements for delivery from the public warehouse to his establishment. Most of the shipments were made to the warehouses in order to maintain an inventory sufficient to take care of expected West Coast business; however, part of the shipments were made pursuant to completed sales (R. 20).

Shipments were made—usually by boat, to keep transportation costs to a minimum—to the public warehouses so as to be able to sell the balls at competitive prices on the West Coast by reducing shipping charges, and in order to speed delivery. The customer was billed for the F.O.B. price at the taxpayer's plant (said price being the same as the uniform base price F.O.B. plant for shipments directly from the plant to customers), plus a charge for the "warehousing and shipping costs." All West Coast customers were billed a flat $.75 for a separate item designated "Prepaid warehouse and freight charges." Of this amount, $.50 represents the shipping costs from the taxpayer's plant to the West Coast warehouses, the balance of the amount representing the average warehouse and handling charges imposed by the West Coast public warehouses (R. 20-21).

In computing its manufacturer's excise tax liability the taxpayer applied the 10 per cent rate to all sales, based upon the F.O.B. plant price, thereby excluding all costs of shipping and warehousing from the taxpayer's plant to the public warehouses on the West Coast on balls shipped to those warehouses (R. 21).

The Internal Revenue Service, after audit of the taxpayer's excise tax returns for 1957 and 1958, assessed additional excise taxes totalling $3,082.12 (and interest in the amount of $295.13), based upon the inclusion of amounts totalling $33,903.36 for the above-mentioned shipping and warehouse costs for shipments to the West Coast warehouses (R. 21-22).

The taxpayer paid the additional taxes and interest, filed claims for the refund thereof, and, more than six months thereafter, instituted the present action to recover the taxes and interest (R. 22-23).

The District Court, by an opinion filed on December 27, 1961, held that the freight and warehousing charges were excludable from the sales price subject to tax (R. 19-28).

The ensuing judgment was vacated by the Court of Appeals on June 28, 1962, and the action was remanded to the District Court for further proceedings. The taxpayer's petition for rehearing was denied on July 25, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Reason for Granting the Writ.

1. The Decision of the Court of Appeals Conflicts with F. W. Fitch Co. v. United States, the Only Relevant Supreme Court Case.

In *F. W. Fitch Co.* v. *United States*, 323 U.S. 582 (1945), this Court held that the "price" upon which the Federal

manufacturers excise tax is to be computed under section 619(a) of the Revenue Act of 1932 (redesignated, and hereinafter referred to, as section 4216(a) of the 1954 Code) is the manufacturer's F.O.B. price at the factory or place of production. In arriving at this interpretation this Court clearly stated:

> "Congress sought in the Revenue Act of 1932 to use the manufacturer's or wholesaler's selling price, rather than the retail price, as the measure of the excise taxes imposed by § 603. 75 Cong. Rec. 11383, 11657. Section 619(a) was designed to lay down specific rules for determining this selling price, especially in relation to costs incurred after the article itself had been manufactured. It provides for the use of the manufacturer's or producer's f. o. b. price at the factory or place of production. In essence, all manufacturing and other charges incurred prior to the actual shipment of an article and reflected separately or otherwise in the f. o. b. wholesale price are to be included in the sale price underlying the tax, while all charges incurred subsequent thereto are to be excluded. *Hence any additional charge which a purchaser would not be required to pay if he accepted delivery of the article at the factory or place of production may be so excluded.* See H. Rep. No. 708 (72d Cong., 1st Sess.) p. 37; S. Rep. No. 665, Part 3 (72d Cong., 1st Sess.) p. 3; H. Conf. Rep. No. 1492 (72d Cong., 1st Sess.) p. 22." *F. W. Fitch Co.* v. *United States*, 323 U.S. 582, 584 (emphasis added).

Under *Fitch* the decisive event defining price is shipment of the completed article *from the factory.* Thus all manufacturing and other costs incurred prior to shipment, such as all manufacturing and national advertising costs, are

includable in the taxable price; all costs incurred pursuant to shipment, such as transportation and similar costs, are excludable from the taxable price. This is precisely the interpretation accorded section 4216(a) by the District Court and the dissenting Chief Judge of the Court of Appeals. Despite the fact that the "F.O.B. factory price" test established by this Court is in accord with the statutory language and the applicable legislative history, and despite the fact that this Court's decision in *Fitch* is a sensible and workable interpretation of the statute, the majority of the Court of Appeals, in disregard of this Court's opinion in *Fitch*, injected a new factor for determining taxable price. Instead of applying the well-established "F.O.B. factory price" test, the Court of Appeals became the first and only Court to deny exclusion to charges incurred in shipping goods from the place of production to the place of distribution.

In arriving at its conclusion, the Court of Appeals relied principally on an old General Counsel's Memorandum and it noted that this Court had approved this ruling in the *Fitch* case. At most, this Court there referred to the inclusion of advertising and selling expenses, pursuant to the ruling; it did not approve anything inconsistent with the taxpayer's position in the instant case. As pointed out by the Chief Judge in his dissent: "the rationale of *F. W. Fitch Co.* v. *United States*, supra, . . . laid down a test contrary, so far as here relevant, to the administrative ruling."

Thus the decision of the Court of Appeals is clearly contrary to the decision of this Court in the *Fitch* case.

Certiorari is appropriate and should be granted in order to preserve the integrity of this Court's correct interpretation of the statute in *Fitch*. See Supreme Court Rule 19, par. 1(b); Robertson and Kirkham, Jurisdiction of the Supreme Court (Wolfson & Kurland ed.), § 344.

2. THE COURT OF APPEALS ERRONEOUSLY CONSTRUED AN IMPORTANT FEDERAL STATUTE WHEN IT DISREGARDED RELEVANT LEGISLATIVE HISTORY AND CONTEMPORANEOUS ADMINISTRATIVE INTERPRETATION, AND RELIED INSTEAD UPON A SUBSEQUENT REVENUE RULING.

Section 4216(a) of the 1954 Code and its predecessors expressly exclude "transportation, delivery, . . . or other charge[s]" from the definition of the price subject to the manufacturer's excise tax. The legislative history of these provisions makes it clear that these charges are excluded pursuant to a Congressional policy of limiting the tax base to the F.O.B. price at the manufacturer's factory or place of production.

The House Report explained the purpose of the test laid down by Congress in section 619(a) of the Revenue Act of 1932, the predecessor to section 4216(a). Its language is unambiguous:

> "In general, [the basis of the tax] should be the manufacturer's or producer's price at the factory or place of production." H. Rep. No. 708, 72d Cong. 1st Sess., p. 37, 1939-1 Cum. Bull. (Part 2) 457, 483.

> "It is of utmost importance that the tax be imposed and administered uniformly and without discrimination. Each member of a competitive group must pay upon substantially the same basis as all his competitors, even though his sales methods may differ. Consequently, the bill requires that every effort be made to ascertain the manufacturer's or producer's price at the place of manufacture or production." Id. at 480.

> "The tax will be imposed upon the producers' price at the place of production or generation." Id. at 484.

The House report clearly supports the simple, workable test established in the *Fitch* case: Sale price is the F.O.B.

price at the factory or place of production. Indeed, this Court in *Fitch* relied upon this legislative history in establishing that test.

Furthermore, the Regulations which were promulgated contemporaneously with the enactment of the original statutory definition of price subject to manufacturer's excise tax in 1932 expressly provided that "in general, this should be the manufacturer's actual price at the factory or place of production" and that "any additional charge which a purchaser would not be required to pay if he accepted delivery of the article at the factory may be so excluded." Articles 8 and 12 of Treasury Regulations 46 (1932 ed.). Again, this Court in *Fitch* relied upon the language from this Regulation in its opinion. 323 U.S. at 584.

The Court of Appeals dismissed the relevant legislative history as "a generalization" and relied upon a revenue ruling promulgated in 1939. The ruling, G.C.M. 21114, 1939-1 Cum. Bull. 351, imposed new requirements that shipping costs must be for the exclusive benefit and convenience of the buyer in order to be excludable and that they must be incurred after completed sales. These new requirements are inconsistent with the statute, inconsistent with this Court's reasoning in *Fitch*, inconsistent with the legislative history, and inconsistent with article 12 of Treasury Regulations 46, the contemporaneous administrative interpretation of the statute.[2] Against the strength of these superior sources of law, the ruling must fall. We urge this Court to grant certiorari in order to correct the decision of the Court of Appeals, which misconstrued an important Federal statute.

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[2] The novel tests introduced by the ruling were subsequently incorporated in Treasury Regulations 46 (1940 ed.), §§ 316.8 and 316.12. It may be noted, however, that these tests were dropped from Regulation 330.1-1, which was made retroactively applicable to the years in question by T.D. 6340 (1959-1 Cum. Bull. 694).

3. This Case Presents Issues Extremely Important to the Sound Administration of Federal Tax Law.

(a) *Numerous Taxpayers are Affected.*

In this case there are no contested issues of fact. The single issue of law involving the interpretation of section 4216(a) will affect all manufacturers who ship completed and packaged products via warehouses. Manufacturers, producers and importers of all articles subject to tax will be affected, as well as the manufacturer in the instant case. The amount indirectly in controversy involves millions of tax dollars annually to taxpayers and the Government alike. Indeed, the Government so stated in oral argument. Unless and until this Court gives authoritative construction to section 4216(a), taxpayers throughout the country cannot know their tax liability; they may doubt that the Court of Appeals has stated the law correctly, but they cannot be certain.

It is appropriate for this Court to grant certiorari and to end finally the controversy over the meaning of section 4216. *United States* v. *Cannelton Sewer Pipe Co.*, 364 U.S. 76 (1960). See Supreme Court Rule 19, par. 1(b); Robertson and Kirkham, Jurisdiction of the Supreme Court (Wolfson & Kurland ed.), § 352.

(b) *Revenue Rulings Should Not Acquire the Force of Law Merely by the Passage of Time.*

The Court of Appeals has promoted a revenue ruling far beyond its proper place. As noted above, it rejected the reasoning of an opinion of this Court and disregarded legislative and administrative history in order to apply G.C.M. 21114. A ruling is not worthy of such respect. See *Bartels* v. *Birmingham*, 332 U.S. 126 (1947); *Helvering* v. *Wilshire Oil Co., Inc.*, 308 U.S. 90, 98 (1939). Furthermore, the Court of Appeals thwarted taxpayer's attempt

to challenge the validity of the ruling simply by referring to its age. A ruling does not acquire force of law merely by age. See *Sims* v. *United States*, 252 F. 2d 434 (4 Cir. 1958). The Court of Appeals clearly misused the revenue ruling; and its precedent, if not reversed, will greatly confound and confuse the orderly process of tax administration. If courts may elevate rulings above more trustworthy sources of law, the Internal Revenue Service will have the power to impose taxes not authorized by Congress. See *Star Motor Co. of California* v. *United States*, 41 F. 2d 991 (Ct. Cl. 1930). This specter, grimly real to the taxpayer, could haunt the entire Code. Only this Court can correct this error. In order to restore administrative pronouncements to their proper place and thereby restore the orderly administration of the Federal tax laws, this Court should grant certiorari. Certiorari was recently granted in *Cory Corp.* v. *Sauber*, 363 U.S. 709 (1960), another excise tax case, in which the single question pertained to the status of revenue rulings. The instant case is even more worthy of review in that it has the additional element of a conflict with the decision of this Court in the *Fitch* case.

Conclusion.

For the foregoing reasons, this Court should grant a writ of certiorari.

Respectfully submitted,

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Appendix A.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action
No. 61-57-C

STOWE-WOODWARD, INC.,
Plaintiff
v.
UNITED STATES OF AMERICA,
Defendant

OPINION

December 27, 1961

CAFFREY, D.J.

This is an action to recover Federal manufacturers' excise taxes brought by the plaintiff corporation under 28 U.S.C.A. 1346(a)(1). Plaintiff seeks to recover $3,377.25, plus interest, for 1957 and 1958 excise taxes it alleges were assessed and erroneously collected by the Government. The following facts have been stipulated as true by counsel for the parties and I so find:

1. Taxpayer is a corporation organized under the laws of the Commonwealth of Massachusetts, with its principal place of business located at 181 Oak Street, Newton Upper Falls, Massachusetts.
2. Taxpayer manufactures hard rubber bowling balls at 181 Oak Street, Newton Upper Falls, Massachusetts. The taxpayer's sales territory for bowling balls encompasses practically the entire United States. The

balls are packed four to a carton, and only on rare occasions will a quantity of less than a carton be sold.

3. All shipments from 181 Oak Street directly to customers are either sent freight collect, or the freight is billed separately to the customer. All balls shipped from 181 Oak Street directly to customers are sold at a uniform base price F.O.B. plant.

4. Shipment of the bowling balls over land to the west coast of the United States used to cost about $1.50 per ball. In order to meet competition on the west coast, bowling balls were sent to public warehouses on the west coast (Los Angeles and Oakland, California, and Tacoma, Washington) in carload or shipload lots. As a result of said change, the transportation charges of a ball were reduced from about $1.50 per ball to approximately $.75 or $.80 per ball for shipping and warehouse costs. The warehouses stocked the bowling balls and delivered them to the purchasers on notification from the taxpayer. The purchaser made his own arrangements for delivery from the public warehouse to his establishment. Part of the shipments to the public warehouse were pursuant to completed sales; however, most of the shipments were made to the warehouses in order to maintain an inventory sufficient to take care of expected west coast business.

5. Shipments were made to the public warehouses so as to be able to sell the balls at competitive prices on the west coast by reducing shipping charges and in order to speed delivery. Shipments to these warehouses were usually made by boat in order to keep transportation costs to a minimum. The customer was billed for the F.O.B. price at the taxpayer's plant (said price being the same as the uniform base price F.O.B. plant for shipments directly from the plant to customers), plus a charge for the warehousing and

shipping costs. The following represents the usual manner in which a customer was billed:

1. Base price for bowling ball	$11.70
2. Add drilling charge	.50
	12.20
3. Add 10% excise tax	1.22
	13.42
4. Deduct drilling charge	.50
	12.92
5. Prepaid warehouse and freight charges	.75
Total billed	$13.67

Of the prepaid warehouse and freight charges specified in item 5, *supra*, $.50 represents the shipping costs from the taxpayer's plant to the west coast warehouses, the balance of the charges representing the average warehouse and handling charges imposed by the west coast public warehouses. All customers were billed a flat $.75 for this purpose.

6. In computing its manufacturer's excise tax liability, the taxpayer applied the 10% rate to all sales, based upon the F.O.B. Newton Upper Falls, Massachusetts, price, thereby excluding all costs of shipping and warehousing from the taxpayer's plant in Newton Upper Falls to the public warehouses on the west coast on balls shipped to west coast warehouses.

7. The Internal Revenue Service, after audit of the taxpayer's excise tax returns for 1957 and 1958, on March 11, 1960 assessed the following additional excise taxes and interest:

Period	*Kind of Tax and Code Section*	*Additional Tax*	*Interest 4/30/57 3/11/61*
March 31, 1957	Manufacturers Excise-4161	169.90	29.16
June 30, 1957	Manufacturers Excise-4161	162.36	25.40
Sept. 30, 1957	Manufacturers Excise-4161	335.06	47.40
Dec. 31, 1957	Manufacturers Excise-4161	519.67	34.54
March 31, 1958	Manufacturers Excise-4161	347.35	38.78
June 30, 1958	Manufacturers Excise-4161	373.80	36.06
Sept. 30, 1958	Manufacturers Excise-4161	384.11	31.29
Dec. 31, 1958	Manufacturers Excise-4161	789.87	52.50
		3,082.12	295.13

8. Said assessment was based upon the inclusion of the following amounts paid for the above-referred to shipping and warehouse costs for shipments to the public warehouses on the west coast of the United States,

Period	*Amount*
3/31/57	$1,868.83
6/30/57	1,785.99
9/30/57	3,685.67
12/31/57	5,716.37
3/31/58	3,820.85
6/30/58	4,111.85
9/30/58	4,225.20
12/31/58	8,688.60
	$33,903.36

As the sales had been completed without billing the customer for the tax on the shipping and warehouse costs, they were considered to be tax-included sales, and accordingly 1/11 of such costs was determined to be the additional tax due.

9. The taxpayer, on March 24, 1960, paid to the District Director the sum of $3,377.25 in satisfaction of the assessment described in item No. 7 *supra*.

10. On May 4, 1960, the taxpayer filed with the District Director of Internal Revenue, Boston, Massachusetts, separate Forms 843, Claims for Refund, for the years 1957 and 1958, in the amounts of $1186.99 and $1895.13, respectively, both plus interest, copies of which are attached to the Complaint filed herein as Exhibits A and B.
11. More than six months have elapsed since the filing of the Claims for Refund and this suit by the taxpayer is not barred by Section 6532 of the Internal Revenue Code of 1954.
12. No part of the aforesaid $3377.25 of excise taxes and interest assessed on March 11, 1960 and paid on March 24, 1960, has been refunded to the taxpayer.

On the basis of the above-stated facts plaintiff contends that the 75¢ additional charge which it makes to its west coast customers to cover its shipping and warehousing costs should not be considered a part of the price of the articles on which the 10% excise tax is computed as required by 26 U.S.C.A. 4161. In making this contention plaintiff relies on the express provisions of 26 U.S.C.A. 4216, which section defines "price" as that word is used in 26 U.S.C.A. 4161. Plaintiff's argument is that the 75¢ separate charge covers transportation and delivery and, therefore, should be excluded from the price of the article.

26 U.S.C.A. 4216 provides:

> "(a) *Containers, Packing and Transportation Charges.*—In determining, for the purposes of this chapter, the price for which an article is sold, there shall be included any charge for coverings and containers of whatever nature, and any charge incident to placing the article in condition packed ready for shipment, but there shall be excluded the amount of tax

imposed by this chapter, whether or not stated as a separate charge. A transportation, delivery, insurance, installation, or other charge (not required by the foregoing sentence to be included) shall be excluded from the price only if the amount thereof is established to the satisfaction of the Secretary or his delegate in accordance with the regulations."

It is the Government's position that the 75¢ charge incurred for transportation and delivery is not excludable from the price upon which the tax is computed and imposed, unless the said charge is incurred directly pursuant to an actual specific sale. The Government asserts that such charges are not excludable if they are primarily for the convenience of the manufacturer, and it argues in its Brief that the bowling balls involved herein were not sent by plaintiff to the west coast pursuant to actual completed sales, but were delivered for the convenience of the manufacturer for storage on the west coast pending anticipated orders from customers. Stated otherwise, the Government's position seem to be that unless the 75¢ charge was incurred in connection with a sale which was a fait accompli, the taxpayer would not be entitled to exclude that 75¢ charge from the price used in computing the amount of the tax due.

The manufacturer's excise tax was first imposed on sporting goods under the provisions of Section 609 of the Internal Revenue Act of 1932. The 10% tax, as it applied to bowling balls, was more clearly spelled out in Section 3406(a)(1) of the Revenue Act of 1941. This tax was increased to 15% by amendment in 1951 and was carried over as Section 4161 of the Internal Revenue Code of 1954, although it was there reduced to 10% of the price for which the balls were sold.

In defining "price" as used in Section 4161, Section 4216 of the Internal Revenue Code of 1954 does not differ in any material way from its forerunners, Section 619 of the 1932 Act and Section 3441 of the 1941 Act. Although the other subsections of 4216 were amended in 1954, Subsection (a), which is the pertinent portion here, remained the same. Legislative history of this tax indicates that it was meant to be levied on a manufacturer's wholesale price for his product and not on the retail price. In 1932, the Chairman of the Committee on Ways and Means for the House of Representatives, in explaining the manufacturer's excise tax bill to the House, emphasized this as the purpose of the law. Vol. 75, *Congressional Record*, pp. 5693, 5694, 5789, 5904. The Senate Committee on Finance also stated: "The manufacturer's excise tax proposal is to levy the tax once upon the article in its finished state, but at its wholesale selling price, not at the retail price." Vol. 75, *Congressional Record*, Senate Report 665, pp. 10085, 11361, 11657. House Report 708 and Senate Report 665 further emphasize that any charge having no connection with the manufacturing process would not be included in the price forming the basis for the tax.

There is no indication that the original intent of Congress in adopting this measure was modified in the subsequent reenactments. Aside from changes in rates in some instances, no substantive changes were contemplated by Congress in passing Sections 4216 and 4161 of the 1954 Code. See House Report 1337, 1954 U.S. Code, Congressional and Administrative News, p. 4468; Senate Report 1662, ibid., p. 5127.

In interpreting Section 619 of the 1932 Act, the Treasury Department, through promulgation of Article 12 of Regulation 46, recognized initially the intent of Congress to "exclude from the price, charges which have no connection with the manufacturing process." In 1940, however,

the Treasury Department more clearly crystalized this interpretation of the statute through the adoption of Section 316.12 of Treasury Regulation 46, which was made applicable to the 1954 Code by Treasury Decision 6.91, C.B. 1954-2, 47. This section states in substance that transportation and delivery charges incurred pursuant to a bona fide sale are excludable.

In the only Supreme Court case involving what is now Section 4216, *Fitch Company* v. *United States,* 323 U.S. 582(1945), the Court gave interpretation to the legislative definition of "price" as embodied in that Section. The precise question presented by that case was whether advertising costs should be included as part of the manufacturer's selling price or excluded as "other costs" referred to in Section 4216. By unanimous decision the Court held that advertising costs, since they are incurred prior to actual shipment and are an integral part of the wholesale price, are not comparable to transportation, delivery, insurance, or installation charges, which Section 4216 specifically excludes. Thus, they cannot be held to be "other charges," referred to in this section.

Although the question there was somewhat different from the one raised here, the interpretations made by the Court in arriving at its decision are particularly pertinent to a decision in the case at bar. In the opinion, written by Mr. Justice Murphy, it is stated, at page 584:

> ". . . Section 619(a) was designed to lay down specific rules for determining this selling price, especially in relation to costs incurred after the article itself had been manufactured. It provides for the use of the manufacturer's or producer's f.o.b. price at the factory or place of production. In essence, all manufacturing and other charges incurred prior to the actual shipment of an article and reflected separately or

otherwise in the f.o.b. wholesale price are to be included in the sale price underlying the tax, while all charges incurred subsequent thereto are to be excluded. Hence any additional charge which a purchaser would not be required to pay if he accepted delivery of the article at the factory or place of production may be so excluded."

The Government, on page 9 of its Brief, argues that the last sentence of this passage represents merely dicta by the Court which cannot be construed as a flat rule excluding all charges which a purchaser pays above and beyond the price of the article at the factory. But it is clear that the quoted passage, taken in its entirety, does express the rationale for the decision. The Court, by the language used in this passage, left no doubt that the purpose of Section 619(a) was to present specific rules for determining the elements to be used in computing the price upon which the tax was to be levied, and this was to be the wholesale price which a purchaser would pay if he were to obtain the goods in finished form at the place of production.

Section 316.12 of the Treasury Regulations, however, as interpreted now by the Government, brings into the determination of the price a completely new factor which was not considered either by Congress in enacting these provisions or by the Supreme Court in reviewing the provisions as it did in the *Fitch* case. The additional factor which the Government seeks to include is whether the costs of transportation and delivery were incurred pursuant to an actual sale and for the benefit of the customer.

Thus, the Government is urging this Court to read into Section 4216 the requirement that the taxpayer must show that the shipping and warehousing costs he seeks herein to exclude in computing the price which serves as the basis for the excise tax, must have been incurred by it in con-

nection with an actual sale which, although the Government does not spell it out, must presumably have been contracted for before the taxpayer incurred the costs in question. I find nothing in the plain language of the statute itself, or in its legislative history, to warrant this novel interpretation. I believe this interpretation sought by the Government stems from a confusion by Government counsel of the distinction between an actual and a prospective sale on the one hand, and the distinction, as exemplified by 26 U.S.C.A. 4216(b)(3), between a sale and a pseudo-sale on the other hand.

I think it is clear that the principle of statutory construction, ejusdem generis, requires the exclusion of the 75c shipping and warehousing charge involved herein. I can conceive of no costs which could come within the meaning of the phrase "or other charge" used in 26 U.S.C.A. 4216(a) if the instant charges do not. Congress, after specifically enumerating transportation, delivery, insurance, and installation costs, then added "or other charge." To adopt the Government's contention in this case would be to rule, in effect, that Congress meant absolutely nothing by the words "or other charge." If the principle of *ejusdem generis* has any validity at all, the charges in the instant case are excludable under Section 4216(a).

I find that the plaintiff is entitled to a refund, as claimed, the amount of which will be computed in accordance with the agreement of the parties set forth in paragraph 14 of their stipulation.

Judgment for the plaintiff.

ANDREW A CAFFREY /s/

U. S. D. J.

Appendix B.

UNITED STATES COURT OF APPEALS
For the First Circuit

No. 5984.

UNITED STATES OF AMERICA,
DEFENDANT, APPELLANT,
v.
STOWE-WOODWARD, INC.,
PLAINTIFF, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[200 F. Supp. 855]

Before WOODBURY, *Chief Judge,* and HARTIGAN and ALDRICH, *Circuit Judges.*

John B. Jones, Jr., Attorney, Department of Justice, with whom *Louis F. Oberdorfer,* Assistant Attorney General, *Lee A. Jackson, Harry Marselli* and *Edward L. Rogers,* Attorneys, Department of Justice, *W. Arthur Garrity, Jr.,* United States Attorney, and *William C. Maddern,* Assistant U. S. Attorney, were on brief, for appellant.

M. Gordon Ehrlich, with whom *Bingham, Dana & Gould* was on brief, for appellee.

OPINION OF THE COURT.

June 28, 1962.

ALDRICH, *Circuit Judge.* This action to recover a portion of certain payments collected as a manufacturers' excise tax, I. R. C. 1954, Ch. 32, on bowling balls, 26 U.S.C.A.

§ 4161, was tried in the district court upon stipulated facts. The sole question is whether the amount sought was based upon a price which improperly included a "transportation, delivery . . . or other charge." The court held for the taxpayer and the government appeals.

Taxpayer is incorporated in Massachusetts, where is its sole factory. Its sales are nation-wide. It customarily packages and ships its product four balls to the carton. Balls shipped directly from Massachusetts are sold f.o.b. factory. Taxpayer found that by shipping in carload lots to a warehouse on the west coast it could, even after including warehouse charges, reduce the per-carton cross-country shipping costs from $1.50 to approximately 75 cents. Also, warehousing provided balls ready for immediate local delivery. Accordingly, to improve its competitive position in the area taxpayer adopted the policy of making such shipments and warehousing in anticipation of orders. A west coast customer is now charged the Massachusetts factory price, plus 75 cents attributed to warehousing and shipping costs, and balls previously shipped [1] are sold to him f.o.b. the local warehouse. It is the government's position, which the district court rejected, that this 75 cent charge is part of the price upon which the tax is to be computed and is not an excluded transportation charge.

The manufacturers' excise tax has applied to sporting goods for many years. It applies to a great many other specific articles which the government informs us would, because of similar business practices, raise the same question involved in this case. The tax is imposed upon the first sale. *Polaroid Corporation* v. *United States*, 1 Cir., 1956, 235 F.2d 276, *cert. den.* 352 U.S. 953. It is upon the wholesale price, if there is one. 26 U.S.C.A. § 4216(b). Section 4216(a) indirectly provides that certain matters are to be excluded.

[1] For discussion of an exception, see *infra*.

> "(a) *Containers, packing and transportation charges.* In determining, for the purposes of this chapter, the price for which an article is sold, there shall be included any charge for coverings and containers of whatever nature, and any charge incident to placing the article in condition packed ready for shipment, but there shall be excluded the amount of tax imposed by this chapter, whether or not stated as a separate charge. *A transportation, delivery, insurance, installation, or other charge* (not required by the foregoing sentence to be included) shall be excluded from the price only if the amount thereof is established to the satisfaction of the Secretary or his delegate in accordance with the regulations." (2d ital. suppl.)

In other words, the "price for which an article is sold" essentially excludes nothing incurred by the manufacturer up to the moment of shipment, even the packaging cost. There is no intent to reduce the price, as taxpayer contends,[2] to purely manufacturing costs. Thus there is no exclusion for general expenses, such as advertising, even though these do not contribute to the manufacturing process. *F. W. Fitch Co.* v. *United States,* 1945, 323 U.S. 582. There the court said, at pp. 584-5, "Regardless of whether we consider such expenses technically as manufacturing costs, it is obvious that they are incurred prior to the actual *shipment* of articles *to wholesale purchasers* and that they enter into the composition of the wholesale selling price." (ital. suppl.)

The essence of the present question would seem to be this. The taxpayer, not its customer, incurred this 75 cent

[2] Taxpayer cites *Campana Corporation* v. *Harrison,* 7 Cir., 1940, 114 F. 2d 400, 410, for the proposition that only normal "manufacturing" costs are to be included in the base, seemingly unmindful of the fact that this case was overruled in *F. W. Fitch Co.* v. *United States,* 1945, 323 U.S. 582, *infra.*

charge. It incurred it to improve the merchantability of its product. By making the balls readily available to customers on the coast, and at a lower total cost to the customer, it added to their attractiveness, or "put value in the articles," *Ayer Co.* v. *United States*, Ct. Cls., 1941, 38 F. Supp. 284, 289, fully as much as by advertising. This expense was not only incurred prior to a shipment to any purchaser, but it was incurred by taxpayer at its own risk before the balls were in any way spoken for—there might never be a customer.

Undeterred by the Supreme Court's statement that the significant event is "actual shipment" to the wholesaler, taxpayer points to the fact that in the original committee report it was stated, "In general, [the basis of the tax] should be the manufacturer's or producer's price at the factory or place of production." H. Rep. No. 708, 72d Cong. 1st Sess. p. 37, 1939-1 Cum. Bull. (Part 2) 457, 583. The language of the act was not so specifically limited. The committee's statement was in terms a generalization. It recognized that "[i]nnumerable situations arise which can be met only by administrative determination." *Id:* at 481. We do not believe that the committee's generalization, or the dictum in *Fitch* repeating it, 323 U.S. at 584, was intended to preclude administrative exceptions for special situations. At the most it created a possible ambiguity. The Commissioner early resolved any ambiguity against the taxpayer. In G.C.M. 21114, 1939-1 Cum. Bull. (Part 1) 351-4 there was given a list of hypothetical situations in which the base price would not exclude certain illustrated costs. The first two of these almost precisely fit the case at bar. The ruling was that such a shipment cost was part of the manufacturer's costs because it was for the "benefit or convenience of the manufacturer." *Id.* at 352. It is noteworthy that subsequent portions of this memorandum were expressly approved in *Fitch*, where they

were described as "consistent administrative construction of the statute." 323 U.S. at 586. The rulings presently involved show a consistent pattern with those so approved, and are part of a piece.

Quite apart from such references in *Fitch*, considerable leeway is allowed for administrative interpretation of a statute. See, *e.g.*, *United States* v. *Leslie Salt Co.*, 1956, 350 U.S. 383; *Commissioner* v. *South Texas Lumber Co.*, 1948, 333 U.S. 496. This principle applies to a G. C. M. ruling, and is not limited to regulations. *Corn Products Refining Co.* v. *Commissioner*, 1955, 350 U.S. 46.[3] If, in the light of its committee report, Congress was dissatisfied with this ruling, it has had over twenty years to take action. However, while during this period the act has been frequently amended, no change has been made in this section. Under the circumstances taxpayer, who is apparently the first to take issue, comes twenty years too late. *Cammarano* v. *United States*, 1959, 358 U.S. 498; *United States* v. *Leslie Salt Co.*, *supra*; *Corn Products Refining Co.* v. *Commissioner*, *supra*. We hold that the 75 cents here involved is not to be excluded as a "transportation, delivery . . . or other charge."[4]

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[3] There is also a pertinent regulation, Treasury Regulations 46 (1940 ed.) Sec. 316.12, reaffirmed, T.D. 6091, 1954-2 Cum. Bull. 47, which, in referring to a "bona fide" sale, is entirely consistent but not so specific as the G. C. M.

[4] The district court felt that the phrase "or other charge" required a decision in taxpayer's favor because the court could think of no other charge except this one. We do not accept the logic of such a principle. This is a general statute, and the fact that no other charges could be imagined in this case, if that was the court's point, is not the test. In other situations we can readily think of other, "similar" (*Fitch Co.* v. *United States*, *supra*, 323 U.S. at 586) charges, as, for example, when a customer, wishing his goods stored after purchase, incurs a demurrage charge. Nor, on this record, can we agree with the court's characterization of the government's position as "novel." The shoe is on the other foot.

One circumstance calls for special consideration. According to the stipulation a minor number of balls were shipped to the coast following a customer's order, rather than in advance of orders. Taxpayer, on whom is the burden of proof, failed to show how many balls were so covered. But, consistent with our views herein expressed, if specific balls were earmarked in Massachusetts for a west coast customer and were delivered to him, the 75 cents charged to such customer was a true shipping charge incurred by him, and should not have formed the basis of the tax. Taxpayer should be allowed to establish the number of balls falling in this category. But this does not include balls merely shipped to the warehouse to replace stock.

Judgment will be entered vacating the judgment of the District Court and remanding the action to that court for further proceedings not inconsistent herewith.

WOODBURY, *Chief Judge*, (dissenting). With reference to the predecessor statute, in substance similar to the one under consideration in the case at bar, the Court in *F. W. Fitch Co.* v. *United States*, 323 U.S. 582 (1945), said at page 584:

> "In essence, all manufacturing and other charges incurred prior to the actual shipment of an article and reflected separately or otherwise in the f.o.b. wholesale price are to be included in the sale price underlying the tax, while all charges incurred subsequent thereto are to be excluded. Hence any additional charge which a purchaser would not be required to pay if he accepted delivery of the article at the factory or place of production may be so excluded."

And again at page 585 the Court said:

> "Pre-shipment charges relative to coverings, containers and placing an article in condition for ship-

ment are specifically included in the determination of the selling price: But a subsequent 'transportation, delivery, insurance, installation, or other charge' is to be excluded if properly established."

The reduced transportation costs here were incurred subsequent to shipment and they were not charged to a purchaser who accepted delivery at the factory or place of production. Therefore they were properly excluded according to the standard set forth by the Supreme Court in the *F. W. Fitch* case.

It is conceded that the cost of transporting bowling balls to a specific, identified purchaser is not to be included in the base upon which the tax is calculated. The question is whether reduced transportation costs, also paid by the purchaser, and incurred as much for the benefit of the seller as for the buyer, to ship balls in quantity to the west coast in anticipation of sales should be treated any differently. I see no basis in the statute itself or in the *Fitch* case for a distinction which causes exclusion to turn upon whether the shipment is pursuant to a completed sale. The issue as I see it is rather whether the costs were incurred prior or subsequent to shipment.

My associates place great weight upon G.C.M. 21114, 1939-1 Cum Bull. (Part 1) 351-4 and the fact that Congress has had over twenty years to change that ruling had it so desired. Conceding that the silence of Congress may be used as a make-weight argument, I think that its silence can as well be construed as indicating approval of the rationale of *F. W. Fitch Co.* v. *United States*, supra, which laid down a test contrary, so far as here relevant, to the administrative ruling. I would affirm on the opinion of the District Court.

Appendix C.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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M. Gordon Ehrlich, with whom *Bingham, Dana & Gould* was on brief, for appellee.

OPINION OF THE COURT
ON PETITION FOR REHEARING.

July 25, 1962.

ALDRICH, *Circuit Judge*. Taxpayer's petition for rehearing essentially repeats that sales price necessarily means

"f.o.b. factory." The statute does not so provide. Nor does taxpayer answer the question we proposed in oral argument that if there were two factories, one on the east coast, and one on the west where the f.o.b. price was higher, would the tax on a west coast purchase be at the east coast price because the customer could have chosen to buy there? We would not distinguish for the purpose of this tax between a place of production and a place of distribution. If a customer finds the articles located at a particular place of distribution, where he necessarily pays a certain price, more desirable, that is the "price" of those particular articles. At least that must be so after twenty years of administrative practice. Taxpayer not only seeks to discount a G.C.M. as representing administrative practice, but *cf. Helvering* v. *Janney*, 1940, 311 U.S. 189; *McFeely* v. *Commissioner*, 1935, 296 U.S. 102; but to disregard *Fitch's* reference to this one. As we have already observed, taxpayer is sometimes given to applying its blind eye to the telescope when looking at *Fitch*. However, the question is not simply how much force the ruling had when it was issued, but how much it has accumulated. See Griswold, A Summary of the Regulations Problem, 1951, 54 Harv. L.Rev. 398, 417-18.

Because we found it unnecessary to rely on Treas. Reg. 46 (1940 ed) 316.12, we did not deal with taxpayer's contention, again repeated, that this regulation was "superseded" by Regulation 330.1-1 (1958). Section 330.1-1 does not in terms repeal anything, and we believe did not repeal section 316.12 unless there was an inconsistency. We find none. It may be noted that the last sentence expressly condemns a separate billing of "expenses" as a means of avoiding the tax.

The petition for rehearing is denied.

WOODBURY, *Chief Judge*, dissents.